In the United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation), *Petitioner,* v. HONORABLE EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Southern Division.	No. 4070

PETITION FOR REHEARING

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Attorney General of the State of Washington.

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PETITION FOR REHEARING

Comes now the Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division, by his attorneys, and respectfully petitions for a rehearing in the above entitled case for the following reasons:

I.

The opinion of this court is largely based upon the conclusions reached by this court that the supreme court of the state of Washington is not vested with legislative power in this class of cases and that under section 10429 Remington's Compiled Statutes, the state courts have no power to grant a supersedeas

in a rate case of this character. It is respectfully submitted that it is unnecessary at this time for this court to go into the question of the legislative power of the supreme court or its power to issue supersedeas under the state's statutes, but that the state courts should under the rule of comity and convenience recognized by the three judges have first been given an opportunity to pass upon these questions of state law. The questions involved in this rate case are important ones to the state of Washington and under the practice followed by the federal courts since the formation of the union every reasonable opportunity should be allowed the state courts to first determine questions involving the constitutionality of state statutes. This court in its opinion holds that it is not permitted to indulge in any presumptions relative to these state statutes and we respectfully call the court's attention to the attitude of the supreme court of the United States in such questions as shown in the case of *Prentis v. Atlantic Coast Line,* 211 U. S. 210, 232:

"There is yet another difficulty in applying to these cases the comity which it is desirable if possible to apply. The Virginia statute of April 15, 1903, enacted to carry into effect the provision of the constitution, requires, by section 34, certain, if not all, appeals to be taken and perfected within six months from the date of the order. 1 Pollard's Code of Virginia, c 56a, 714. It may be that when an appeal is taken to the Supreme Court of Appeals this section will be held to apply and the appeal be declared too late. *We express no opinion upon the matter, which is for the state tribunals to decide, but simply notice*

a possibility. If the present bills should be dismissed, and then that possible conclusion reached, injustice might be done. As our decision does not go upon a denial of power to entertain the bills at the present stage but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed as brought too late the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismissed without prejudice and filed again." (Italics ours.)

Irrespective, therefore, of whether or not the state courts have legislative power and can or cannot grant a stay of proceedings in rate cases of this character, it is submitted that this court should have taken the same view of the prior right of state courts to interpret the state statutes and should have refrained from determining these questions at this stage of the proceedings, especially in view of the fact that the same questions are now directly before the supreme court of the United States on the appeal from the decision of the three judges.

Attention is further called to the fact that this court in its opinion has apparently overlooked section 10441 Rem. Comp. Stat. which was cited by the three judges as evidence of the legislative power of the state court. While we believe this court, in passing upon the question of the issuance of the writ of mandamus in this case should have refrained from determining the question of the power of state courts

if the state statutes are to be construed, section 10441 should be considered as well as section 10429. The question of the constitutionality of the state's statutes and the powers of state courts should not have been passed upon in this proceeding. The rule governing the court in the consideration of an application for a writ of mandamus to the district court is well set forth in the case of *Ex Parte Metropolitan Water Company,* 220 U. S. 539, 546-55 Law Ed. 575-578, as follows:

"While these considerations dispose of the case, we briefly advert to an insistence made in argument that we should not take jurisdiction of the merits of the case as made in the circuit court, and determine whether or not the bill stated a case entitling to relief. Not being vested with original jurisdiction to pass upon the question of the validity of the Kansas statute, and the petitioner being entitled as of right to have the controversy as to the constitutionality of the statute, presented by its bill of complaint, passed upon by a tribunal having such original jurisdiction, it follows that *we do not possess a discretion to grant or refuse the writ, dependent upon our conception as to whether the Kansas statute is or is not constitutional.*" (Italics ours.)

Considerable stress is laid in the opinion of this court upon the case of *Oklahoma Gas Company v. Russell,* 261 U. S. 290, but the court seems to have overlooked the fact that distinguishes that case from the case at bar as pointed out in our brief, namely, that in the Russell case the company, *before having recourse to the federal courts applied to the state supreme court for a supersedeas and was denied.* It

is therefore, entirely different from the case here where the telephone company has refused at all stages of the proceedings to apply to the state courts.

II.

The undoubted effect of the decision of this court is to overrule and reverse the decision of the three judges and the order of the district court in the original suit started by the telephone company. It is true as stated in the opinion that this court may issue a writ of mandamus in aid of its appellant jurisdiction when the lower court has wrongfully refused to proceed with the case, but in the instant case the special tribunal of three judges after going into the subject fully, decided that as a matter of law that tribunal should not entertain jurisdiction of the application for a preliminary injunction until the telephone company had exhausted its remedies in the state courts or been refused a stay by the state courts. Thereafter the district court stayed proceedings in his court for the same reasons that had determined the three judges to deny the application for a preliminary injunction. It is well established law that the decision of the three judges and the order of the district court cannot be reviewed in a mandamus proceeding. With reference to the decision of the three judges, the telephone company had its option of complying with their suggestion that they apply to the state courts for relief or appealing therefrom to the supreme court of the United States. The question of whether the three judges were right or

wrong cannot be reviewed by this court, yet we do not see how one reading the opinion of this court can fail to see clearly that this court has determined that the three judges were wrong in the reasons which actuated them to deny the preliminary injunction and has in fact reversed the decision of the three judges.

The order of the district court being based upon the same reasons as the decision of the three judges, upon the entry of such order, the telephone company had its option of applying to the state courts for relief and upon the showing that they were unable to obtain such relief after a bona fide attempt no doubt the district court would then have proceeded to hear their case, or they could have decided to abide the result of an appeal from the order of the three judges which in the event the supreme court of the United States reverses the three judges, would at once permit the district court to proceed with the suit on the merits, or the telephone company could have refused to proceed further and obtained an order of dismissal from which final order an appeal could be prosecuted. The telephone company, however, has refused to apply to the state courts in any shape or form whatever; has taken an appeal from the order of the three judges, but does not wish to abide the result of such appeal before continuing proceedings in the district court, and evidently did not wish to have an order of dismissal entered so that it might appeal from such final order and we do not see how the conclu-

sion can be escaped that the application for writ of mandamus was simply used as a substitute for an appeal or a writ of error in order that the decision of the three judges and the order of the district court might perhaps be reviewed and reversed by this court. In its final analysis the proceedings before the three judges, the proceedings before the district court the proceedings before this court in the instant case and the appeal to the supreme court of the United States involved but one question, namely that of jurisdiction and it was impossible for this court to direct the issuance of a writ of mandamus without reversing the decision of the three judges and the order of the district court in regard to jurisdiction. This question of jurisdiction in view of the appeal taken to the supreme court can only be properly determined by that court and not by this court in a mandamus proceeding.

III.

This court in its opinion devotes but little attention to the proposition urged in our brief that neither the district court nor this court now have jurisdiction of this proceeding for the reason that an appeal from the decision of the three judges is pending before the supreme court of the United States. In discussing that matter this court in its opinion states:

"This was not one of the reasons assigned by the trial judge for refusing to proceed, and perhaps we should not consider it."

We think the court has overlooked the dates involved. The order of the trial court denying the telephone company's motion to require the defendant to answer forthwith was made on July 9, 1923. The notice of appeal from the decision of the three judges was filed by the company on July 16, 1923, one week after the entry of this order by the trial court. Naturally, therefore, it was not a ground for the trial court's decision on the motion, nor was the appeal called to the attention of this court by the telephone company in its petition for the writ of mandamus. In our answer to the order to show cause, however, all of the papers in the appeal were made a part of the record and the entire record on appeal was before this court. In view of the fact that the record was before the court and that the appeal had been taken by the company after the order of the district court complained of and before application to this court for the writ of mandamus and in further view of what we believe to be the effect of such appeal, we feel that this court should reconsider this question and thoroughly examine the effects of the appeal.

The opinion cites Elliott on Appellate Procedure, section 542, relative to the view that an appeal from an interlocutory order does not completely oust jurisdiction of the trial court. We call attention to one statement in that section:

"If, for instance, an appeal is duly taken from an order appointing a receiver, only so much of the

case as affects that order is carried out of the jurisdiction of the trial court, and, as it retains jurisdiction of the principal issues, it may proceed to hear and determine them, *but it certainly could not hear or decide the branch of the case removed by the appeal to the higher court.*" (Italics ours.)

No cases are cited in the text to sustain this statement, so we are unable to determine just what the text has in mind, but a clearer statement of the rule will be found in 3 Corpus Juris 1259 as follows:

"Section 1371-2. Incidental or Interlocutory Appeals. An appeal on an incidental or interlocutory matter does not divest jurisdiction, but the trial court or parties may proceed in matters not involved in the appeal and which are entirely collateral to the part of the case taken up; and, as nothing is in the upper court but the order, a motion for an order in the cause cannot be entertained in that court. The lower court, however, cannot proceed in such manner as to lead to a decision, pending the appeal, of the very question involved on the appeal, or of a question which cannot properly arise or be determined until after the determination of the appeal."

The following cases are cited in Corpus Juris and sustain the rule as given:

Ex Parte City Council of Montgomery, 114 Ala. 115, 14 So. 364,

Syl.—"An appeal from an order dissolving a temporary injunction restraining defendant from selling plaintiff's land under a decree requires the supreme court to pass on the question whether the bill contains equity; and hence, during the pendency of such appeal, the lower court cannot hear and deter-

mine a demurrer taken to the bill for want of equity, and mandamus will not issue to compel it so to do."

Sease v. Dobson, 34 So. Car. 345, 13 S. E. 530,

Syl. 3—"A hearing on the merits was properly refused, where it would require the decision of a material question involved in a pending appeal from an order in the case refusing an injunction."

Fowler v. Lewis' Admr., 36 W. Va. 112, 14 S. E. 447;

Bonner v. Rodman, 163 No. Car. 1, 79 S. E. 271.

The following additional cases also sustain the rule that on an appeal from an interlocutory order, the lower court cannot take further proceedings pending the appeal when the appeal involves the same questions upon which the trial court must pass in further proceedings.

State v. Earle, 44 S. E. 781 (So. Car.);

Wylie v. Blake & Knowles Steam Pump Works, 221 Mass. 489, 109 N. E. 386;

Combes v. Adams, 150 N. Car. 64, 63 S. E. 186;

Joyner v. Champion Fibre Co., 101 S. E. 373, (No. Car.);

Napier v. Dover, 104 S. E. 214 (Ga.);

Hill v. Wood, 238 S. W. 309 (Texas);

McKeal & McNeal v. Martin, 241 S. W. 782, 243 S. W. 575 (Texas).

At the very threshold of the original proceeding in the district court the three judges were obliged to consider the question of jurisdiction and the three judges determined that in accordance with the rule of comity and convenience followed by the federal courts in cases involving procedure under section 266

of the judicial code, the telephone company was not entitled to be heard on the merits in an application for a preliminary injunction until it had exhausted its state remedies. In other words, the decision of the three judges is essentially based on the question of jurisdiction.

When the company, after the decision of the three judges and prior to an appeal from such decision, applied to the trial judge to proceed with the suit, the trial judge was also obliged to consider the question of jurisdiction and for the same reasons that the three judges had set forth for not considering the preliminary injunction, the trial judge determined that he ought not entertain jurisdiction until the company had exhausted its state remedies. In other words, the trial judge held that the same rule of comity and convenience restrained him from proceeding on a hearing for a permanent injunction that influenced the three judges as to a hearing on the preliminary injunction. Therefore, in the district court, as well as before the three judges, the sole question involved was the question of jurisdiction.

Section 266 of the judicial code expressly authorizes an appeal direct to the supreme court of the United States from the order granting or denying an interlocutory injunction. It is a rule that interlocutory orders are not appealable unless such appeal is expressly authorized by statute. In this case the appeal has been expressly authorized, and we believe

that it was unquestionably the intention by such authorization in the event of a denial of the injunction on jurisdictional grounds to have that question cleared up before any further proceedings were had, as otherwise great confusion and uncertainty is bound to result.

It is evident that if the district court in pursuance to the mandate issued by this court should deny the motion to dismiss and proceed with the case, and later the supreme court of the United States in determining the appeal should sustain the three judges and hold that the company should have first exhausted its state remedies, the proceedings in the district court will have been futile and ridiculous and inasmuch as the company has seen fit to carry the question of jurisdiction to the supreme court of the United States, we submit that it should abide by the result of that action and await the decision of that court instead of applying to this court for relief.

Under the rule governing appeals from interlocutory orders cited above, we believe that neither the district court nor this court has jurisdiction to take any further proceedings until this question of jurisdiction involved in the appeal has been settled by the only court authorized by law to settle it, but even though this court should hold that such appeal did not absolutely stay further proceedings as a matter of law, we still believe that proceedings should be stayed as a matter of orderly procedure and due administration of justice. The statement of the district court as to its reasons for staying the entry of

a final decree in the case of *Hanssen v. Pusey & Jones Co.*, 286 Federal 707, should, we think, govern this court and the district court in a proceeding like this where the question of jurisdiction is pending before the supreme court on appeal. In the case cited, the court observes:

"Notwithstanding the foregoing conclusions, and the refusal to permit the filing of the affidavit, this court has notice of the fact that the Supreme Court now has before it for its review and determination the record and questions that were before this court and the Court of Appeals upon the application for the appointment of receivers pendente lite. It may be that the entry of a final decree at this time would make moot the questions now before the Supreme Court in this cause. I think, under such circumstances, proper deference to the Supreme Court, orderly procedure, and due administration of justice require this court of its own motion to postpone the entry of a final decree in this cause until after the decision of the Supreme Court I am the more convinced of the soundness of this conclusion by reason of the fact that the final hearing was had, as a result of the stipulation of the parties, upon the identical record that is now before the Supreme Court."

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of the State of Washington.

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington.

Solicitors for Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.

E. K. MURRAY,
THOMAS J. L. KENNEDY,
Of Counsel.

STATE OF WASHINGTON,
County of Thurston, } ss.

JOHN H. DUNBAR, being first duly sworn on oath deposes and says: That he is one of the attorneys of record for the respondent in the above entitled case, and that he hereby certifies that, in his judgment, this petition for a rehearing is well founded, and that it is not unjust for appellee.

.....

Subscribed and sworn to before me this....
.....day of November, 1923.

.....

Notary Public in and for the State of Washington, residing at Olympia.